Supreme Court, U.S.
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No. 91-1220

In The

Supreme Court of the United States

October Term, 1991

WILLIAM H. VIEHWEG,

Petitioner,

vs.

JOSEPH F. DEVEREUX, JR.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

The following questions, rather than the questions identified by petitioner, would be presented for review in this case:

1. Whether this Court is without jurisdiction to review petitioner's petition for writ of certiorari in that this petition has not been filed within the period allowed by law and that plaintiff's application to extend the time to file his petition failed to set forth specific grounds to justify a time extension?

2. Whether the District Court erred in sustaining defendant's motion to dismiss for failure to state a claim upon which relief may be granted as plaintiff's cause of action sounding in legal malpractice and/or fraud is barred by § 516.100 and § 516.120 R.S. Mo. (1986), because plaintiff did not timely file his action within five (5) years of having determined or should have determined due diligence, the existence of the alleged wrongful conduct on the part of the defendant?

3. Whether the District Court erred in sustaining defendant's motion to dismiss for failure to state a claim upon which relief may be granted as plaintiff did not rely on constructive fraud as the basis of his cause of action and/or defendant timely raised a statute of limitations defense to plaintiff's legal malpractice and/or fraud claims?

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II. Petitioner fails to present an appealable issue in his petition for writ of certiorari, pages 9 through 12, generally arguing that the federal courts must favor actions by *pro se* litigants against their federal court-appointed attorneys which sound in fraud and arise from the attorney-client relationship in that no issue is presented for review and if such issue is found to be asserted, it was not presented below. 9

III. The District Court did not err in sustaining defendant's (respondent's) motion to dismiss for

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failure to state a claim upon which relief may be granted as plaintiff's (petitioner's) cause of action sounding in legal malpractice and/or fraud is barred by §§ 516.100 and 516.120 R.S. Mo. (1986), because plaintiff (petitioner) did not timely file his action within five (5) years of having determined or should have determined with due diligence, the existence of the alleged wrongful conduct on the part of the defendant (respondent). 10

IV. The District Court did not err in sustaining defendant's (respondent's) motion to dismiss for failure to state a claim upon which relief may be granted as plaintiff (petitioner) did not rely on constructive fraud as a basis of his cause of action and/or defendant timely raised the statute of limitations defense to plaintiff's (petitioner's) legal malpractice and/or fraud claims thereby not entitling plaintiff (petitioner) to proceed to a jury trial. 13

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No. 91-1220

In The

Supreme Court of the United States

October Term, 1991

WILLIAM H. VIEHWEG,

Petitioner,

vs.

JOSEPH F. DEVEREUX, JR.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eight Circuit

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Respondent is dissatisfied with petitioner's statement of the case and therefore provides the Court with the following:

Petitioner, William H. Viehweg, brings this appeal following the Eighth Circuit Court of Appeals affirming the ruling of the

District Court sustaining the motion of respondent, Joseph F. Devereux, Jr., to dismiss for failure to state a claim upon which relief may be granted. Petitioner filed his action premised upon 28 U.S.C. § 1332 alleging fraud and/or legal malpractice against Mr. Devereux on December 12, 1990, after the following relevant events:

On February 14, 1985, respondent, a licensed attorney and member in good standing of the Missouri Bar Association, was appointed by the United States Magistrate Judge of the Eastern District of Missouri, David C. Noce, to defend petitioner in a federal case filed against the petitioner by his former employer RE/MAX of America, titled *RE/MAX of America, Inc. v. William H. Viehweg*, Cause No. 85-0349C(3) (E.D. Mo. 1985). Subsequent to apparent disagreement between petitioner and respondent concerning the defense effort, the petitioner instructed the respondent to cease representing him in the action. Respondent subsequently filed a motion to withdraw as petitioner's counsel from the case which was granted by the court on April 22, 1985. The petitioner did not obtain further legal representation and proceeded to represent himself *pro se* before the District Court for the remainder of the action. The case was tried to the bench during the week of June 3, 1985, before United States District Judge William L. Hungate. On September 11, 1985, the court ruled in favor of the plaintiff, RE/MAX of America, Inc. and ordered the petitioner to pay RE/MAX in excess of $85,000. Further, the court issued injunctive relief in favor of RE/MAX.

Following the ruling, the petitioner *pro se* filed his notice of appeal on October 16, 1985, in an attempt to perfect his appeal challenging the sufficiency of the judgement. On October 28, 1985, the Eighth Circuit Court of Appeals [Cause No. 85-2243(EM)] denied petitioner's motion for appointment of counsel and issued a show cause order to petitioner permitting him fifteen (15) days in which to rebut the dismissal of his appeal as frivolous. On

November 15, 1985, petitioner filed his response to the show cause order. On December 12, 1985, the Eighth Circuit Court of Appeals ruled by entering the following order:

> On October 28, 1985, Court ordered appellant to show cause within fifteen (15) days while appeal should not be dismissed as frivolous. Appellant filed response on November 15, 1985, after consideration of appellant's response, appeal is ordered and dismissed as frivolous and not brought in good faith.

On December 12, 1990, five (5) years and ninety-two (92) days after the September 11, 1985 ruling of the District Court, petitioner filed the underlying action naming respondent as defendant and alleging causes of action premised on legal malpractice and a claim presumably alleging fraud. Service of process was had upon respondent on December 31, 1991. Thereafter, respondent timely filed his motion to dismiss petitioner's complaint for failure to state a claim upon which relief may be granted pursuant to Rule 12(d)(6) of the Federal Rules of Civil Procedure, stemming from the grounds that the complaint should be dismissed as the action was time-barred by the applicable statute of limitations provided for in §§ 516.100 and 516.120 R.S. Mo. (1986).

On January 17, 1991, petitioner personally served upon the offices of respondent's counsel a first amended complaint, together with other pleadings. A reading of all papers served revealed that petitioner attempted to plead legal malpractice and a cause of action presumably alleging "fraud" by adding, among other things, paragraphs 8 through 16.

On February 4, 1991, petitioner moved to file his second amended complaint to add allegations and join a co-defendant.

Taking up all motions, the District Court, Honorable Jean C. Hamilton, United States District Judge, on March 1, 1991, ruled that the statute of limitations for petitioner's cause of action sounding in breach of fiduciary duty, and if the complaint could be construed to plead a cause of action for fraud, is five (5) years, citing § 516.120 R.S. Mo.; *Carr v. Anding*, 793 S.W. 2d 148, 149-50 (Mo. Ct. App. 1990). The District Court noted that, for the purposes of the statute of limitations, a cause of action for fraud or breach of fiduciary duty occurs when the damage resulting therefrom is sustained and capable of ascertainment. § 516.100 R.S. Mo.; *Zero Mfg. Co. v. Husch*, 743 S.W. 2d 439, 441 (Mo. Ct. App. 1987) (statute of limitations begins to run once the fact of damage is capable of ascertainment despite the fact that the amount of damage is not determined). The District Court held that petitioner's damages occurred between February 14, 1985, (the date upon which respondent began to represent the petitioner), and September 11, 1985 (the date judgment was rendered against the petitioner). The District Court further held that the petitioner was capable of ascertaining damage with respect to respondent's representation on the date when respondent withdrew, April 22, 1985. The District Court determined that the latest date that the cause of action premised upon fraud or breach of fiduciary duty accrued on behalf of petitioner was on September 11, 1985. The District Court concluded that petitioner's action for breach of fiduciary duty was barred by the statute of limitations and explictly stated that the petitioner failed to properly plead fraud, but stated that even if he had, the action was time-barred by § 516.120 R.S. Mo. The District Court further concluded that the petitioner knew or should have known the facts of the alleged fraud at a point in time no later than September 11, 1985, and therefore, the petitioner's action premised on fraud was time-barred. The District Court denied the petitioner's motion to amend and join an additional co-defendant stating that the allegations of the Second Amended Complaint related to the same time-barred causes of action pleaded in the first amended complaint. Further, the District

Court granted respondent's motion to dismiss with prejudice and denied all other outstanding motions as moot.

On March 25, 1991, petitioner filed his notice of appeal with the Eighth Circuit Court of Appeals citing that the District Court erred in granting respondent's motion to dismiss; denying his motion for leave to amend and join a co-defendant; dismissing as moot petitioner's sanctions motion; and, denying his motion to amend and join prior to ruling on his motion to strike respondent's reply. A briefing schedule was established, and after a permitted extension of time, the petitioner filed his brief on June 3, 1991.

On September 24, 1991, the Eighth Circuit Court of Appeals filed its affirmance of the District Court's ruling. *RE/MAX of America, Inc. v. Viehweg*, No. 91-1788, slip op. (8th Cir., September 24, 1991) (R.A. 8a-12a). On or about December 7, 1991, the petitioner filed his application for extension of time for which to file his petition for writ of certiorari. In response, on December 12, 1991, respondent filed his motion in opposition to petitioner's application for extension of time to file petition for writ of certiorari. On December 17, 1991, the petitioner and respondent were notified that Justice Blackmun signed an order on December 17, 1991, extending the time for which to file his petition for writ of certiorari, up to and including January 21, 1992. On January 21, 1992, the petitioner filed his petition for writ of certiorari with this Court.

PERCEIVED MISSTATEMENTS OF FACT OR LAW

1. Since the United States Court of Appeals for the Eighth Circuit issued its order on September 24, 1991, affirming the judgment of the District Court as reprinted in petitioner's brief, pages 19 through 22, petitioner's petition for writ of certiorari was not timely filed, despite petitioner's application for an

extension of time for which to file, since petitioner's grounds for the extension of time failed to meet the standard of "good cause shown" required for granting a time extension. *Kleem v. Immigration and Naturalization Service*, 479 U.S. 1308 (1986); *Mississippi v. Turner*, ____U.S.____, 111 S. Ct. 1032 (1991).

2. Petitioner alleges, in his statement of the case, that respondent Devereux moved for and was granted the court's permission to withdraw as counsel is incorrect in that subsequent to an apparent disagreement between a petitioner and respondent concerning the defense effort in the underlying civil action styled *RE/MAX of America, Inc. v. William H. Viehweg*, Cause No. 85-0349C(3) (E.D. Mo. 1985), petitioner instructed respondent to cease representing him in the action. Respondent subsequently filed a motion to withdraw as petitioner's counsel from the case which was granted by the court on April 22, 1985.

3. Petitioner alleges, in his statement of the case, page 6, that he initiated his civil action against respondent exactly five (5) years after the Eighth Circuit Court of Appeals dismissed his appeal in the underlying action styled *RE/MAX of America, Inc. v. William H. Viehweg*, is incorrect since the filing of the civil action on December 12, 1990, was five (5) years and ninety-two (92) days after the September 11, 1985 ruling of the District Court in the underlying action styled *RE/MAX of America, Inc. v. William H. Viehweg*.

4. Petitioner alleges, in his statement of the case, page 8, that he timely initiated his appeal to this Court by requesting an extension of time in which to file, which was granted up to and including January 21, 1992, is incorrect in that petitioner failed to properly support his application for extension of time by setting forth "good cause shown" upon which for the Court to grant the application for extension of time to file his writ of certiorari.

REASONS FOR DENYING THE WRIT

I.

This Court is without jurisdiction to review petitioner's petition for writ of certiorari in that this petition has not been filed within the period allowed by law and that petitioner's application to extend time was not supported by specific grounds upon which to justify any extension of time to file his petition for writ of certiorari.

As referenced beginning on page 7 of petitioner's petition, the United States Court of Appeals for the Eighth Circuit, filed its September 24, 1991 order, ruling that the judgment of the Honorable Jean C. Hamilton, United States District Judge, was affirmed.

Per Supreme Court Rule 13.4, the time for filing a petition for writ of certiorari runs from the date of judgment or decree sought to be reviewed, which, in this case, would be the above referenced order of September 24, 1991. If, however, an application for extension of time for which to file a petition for writ of certiorari is timely filed with this Court, and supported with "good cause shown", the Court may grant the extension of time. Sup. Ct. R. 13.2.

Petitioner filed, on or about December 7, 1991, his application for extension of time for which to file his petition for writ of certiorari with this Court. (*See* Respondent's Appendix.) On December 12, 1991, respondent filed his motion in opposition to the petitioner's application for extension of time to file petition for writ of certiorari, (*see* Respondent's Appendix) (R.A. 1a-2a), stating that petitioner's application for extension of time to file his petition for writ of certiorari (R.A. 3a-5a), did not meet the standard of "good cause shown" for granting an extension of

time. *Citing Kleem v. Immigration and Naturalization Service*, 479 U.S. 1308 (1986); *Mississippi v. Turner*, ____ U.S. ____, 111 S. Ct. 1032 (1991).

Petitioner's grounds for seeking the extension of time for which to file his petition for writ of certiorari included the following:

> 3. Viehweg, a non-attorney, has been *pro se* through this action solely because of his inability to obtain legal counsel.
>
> 4. As *pro se*, Viehweg misunderstood the ninety (90) days filing as merely a Notice of Appeal, not necessitating a complete Petition upon which the immediate fate of Viehweg's action will be determined.
>
> 5. As such, Viehweg spent most of his allotted time soul-searching and issue challenging and only recently did decide to appeal and now finds himself faced with a difficult task of writing a Petition that not only conforms to the on-first-sight complicated rules of procedure, but also is able to hopefully persuade this august Court to take my issue serious — whether or not it ultimately decides to grant my Writ.
>
> 6. The subject matter involved in this action is brought by an attorney upon his client, and as such is, besides being delicate, difficult and serious.

As so held by this Court in *Kleem v. Immigration and Naturalization Service*, 479 U.S. 1308 (1986) and *Mississippi v. Turner*, ____U.S.____, 111 S. Ct. 1032 (1991), this Court held that an attorney's desire for additional time to research and prepare

the writ of certiorari in response to an appellate court's adverse ruling upon important questions of the Constitution of the United States and state budgetary cuts resulting in the reduction of an appellate staff, did not meet the standard of "good cause shown" for the granting of a time extension. In addition, this Court has stated that under this Court's Rule 20.6, requests for extensions of time "are not favored."

Accordingly, petitioner's grounds for which to seek his extension of time for which to file his petition for writ of certiorari clearly failed to meet the standard of "good cause shown" for the granting of a disfavored time extension, and therefore petitioner's writ of certiorari to this Court is time-barred and therefore should be dismissed for wanting of jurisdiction.

II.

Petitioner fails to present an appealable issue in his petition for writ of certiorari, pages 9 through 12, generally arguing that the federal courts must favor actions by *pro se* litigants against their federal court-appointed attorneys which sound in fraud and arise from the attorney-client relationship in that no issue is presented for review and if such issue is found to be asserted, it was not presented below.

Respondent is unable to effectively respond to petitioner's argument located on pages 9 through 12 of his petition for writ of certiorari due to the fact that no appealable issue is asserted. Respondent can only state that the record of the District Court reflects that as a result of an apparent disagreement between petitioner and respondent concerning the defense effort, petitioner instructed respondent to cease representing him in the action. Further, petitioner failed to raise this "issue" in appeal which bars its current assertion. *EEOC v. FLRA*, 476 U.S. ____, 106 S. Ct. 1678, 1681 (1986). Consequently, petitioner's argument,

being unintelligible and being brought for the first time before this Court without prior appellate review, fails to properly present an appealable issue. Accordingly, petitioner's petition for writ of certiorari should be denied for failure to present an appealable issue.

III.

The District Court did not err in sustaining defendant's (respondent's) motion to dismiss for failure to state a claim upon which relief may be granted as plaintiff's (petitioner's) cause of action sounding in legal malpractice and/or fraud is barred by §§ 516.100 and 516.120 R.S. Mo. (1986), because plaintiff (petitioner) did not timely file his action within five (5) years of having determined or should have determined with due diligence, the existence of the alleged wrongful conduct on the part of the defendant (respondent).

Petitioner's argument contained in pages 12 through 14, generally convey to the Court that in petitioner's opinion he pleaded constructive fraud in his first amended complaint and that as a *pro se* litigant he would be denied his "due process of law" if he was held to a higher standard of "technical perfection or to a higher standard of tort — actual fraud".

Petitioner's first amended complaint contains the following relevant allegations:

> 12. That defendant, upon requesting the Trial Court's permission to withdraw knowing that such permission was required and that said permission was only granted for good cause, did, while defendant was still within said Relationship, knowingly falsely argued to the Court that his withdrawal was based on mere differences or

> opinion by defendant and plaintiff, knowingly falsely argued to the Court that plaintiff had requested defendant to file a Counterclaim for improper purposes, and knowingly falsely argued to the Court that plaintiff, *pro se*, could correct any errors and continue in said Suit without any delay in the said trial date, which was only five (5) weeks away and no answer in response to RE/MAX's substantially Amended Complaint had yet been filed, in order to wrongfully obtain the Court's permission to withdraw . . .
>
> 16. That it was not until the early Fall of 1990 that plaintiff, doing personal research in the expectation of filing a *pro se* action against defendant for legal malpractice, did first learn that defendant had duties to plaintiff of which defendant violated, and that plaintiff had multiple substantial legal rights of which defendant violated, and that defendant had a duty to inform plaintiff of said duties and rights, and that defendant's violations of said duties through misrepresentation was fraud.

A cause of action for fraud accrues when knowledge of the facts constituting the alleged fraud is acquired. *Kueneke v. Jeggle*, 658 S.W. 2d 516, 518 (Mo. Ct. App. 1983). The petitioner is deemed cognizant of the facts that should have been known and is held to have known facts that could, by reason of ordinary care and being commensurate with the circumstances, have been discovered by due diligence. *Id.* If petitioner had the means with which to discover the fraud, he is deemed to know of the fraud. *State v. Harris*, 714 S.W. 2d 516, 573 (Mo. Ct. App. 1986); *Harding v. Modern Income Life Ins. Co.*, 593 S.W. 2d 568, 573 (Mo. Ct. App. 1979).

The point in time when petitioner could have ascertained his damages occurred between February 14, 1985 and September 11, 1985. The damages were ascertainable by petitioner when respondent withdrew on April 22, 1985. The District Court correctly made such an express finding on page 4 of its March 1, 1991 memorandum and order. (Refer to pages 23 through 32 of petitioner's petition.) Last, the District Court concluded that even if the September 11, 1985 date was the point in time that petitioner's cause of action accrued, the date is over five (5) years from the date petitioner filed the underlying action, which occurred on December 12, 1990. Petitioner did not require the Court of Appeals to dismiss, as frivolous, his appeal, in order to establish the accrual date of any action on an alleged malpractice and/or any fraud. As the District Court below determined, at the very latest, the petitioner was aware of or should have been aware of any damage arising from respondent's representation on April 22, 1985 (the date of withdrawal), or by September 11, 1985, at the very latest.

Respondent's raising of the statute of limitations defense was done so in response to petitioner's complaint whether or not fraud, actual or constructive, was alleged. The fact that petitioner recently chose to label or argue his cause of action as a constructive fraud count does little to alter the fact that the statute of limitations defense was previously raised in opposition to the cause of action pleaded and is, therefore, effective for such cause of action. Further, the District Court held that petitioner failed to adequately plead fraud. (Refer to petitioner's petition for writ of certiorari, page 29.)

Accordingly, this Court must deny the petitioner's petition for writ of certiorari on the further basis that the District Court did not err in dismissing his *cause* of action on the basis that petitioner did not file his case within the relevant statute of limitations.

IV.

The District Court did not err in sustaining defendant's (respondent's) motion to dismiss for failure to state a claim upon which relief may be granted as plaintiff (petitioner) did not rely on constructive fraud as a basis of his cause of action and/or defendant timely raised the statute of limitations defense to plaintiff's (petitioner's) legal malpractice and/or fraud claims thereby not entitling plaintiff (petitioner) to proceed to a jury trial.

Petitioner argues that on page 14 through 18 of his petition for writ of certiorari that he was denied his right to a jury trial for his cause of action sounding in constructive fraud due to the District Court's error in granting respondent's motion to dismiss for failure to state a claim upon which relief may be granted. Respondent is aware of no right to a jury trial where a litigant lacks a cause of action upon which to base such a claim for a right to a jury trial. Petitioner in the instant case, as determined by the District Court, failed to adequately plead any claim of fraud within the time period allotted by the statute of limitations, and therefore has no cause of action for which to assert a right of jury trial. Accordingly, this Court must deny petitioner's petition for writ of certiorari on the basis that the trial court did not err in dismissing his cause of action on the basis that petitioner did not file his case within the relevant statute of limitations.

CONCLUSION

For the reasons stated herein, the petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit should be denied.

Respectfully submitted,

RONALD C. WILLENBROCK
AMELUNG, WULFF &
WILLENBROCK
Attorneys for Respondent

APPENDIX A — APPLICATION FOR EXTENSION OF TIME TO FILE PETITION FOR WRIT OF CERTIORARI

THE SUPREME COURT OF THE UNITED STATES

WILLIAM H. VIEHWEG,

Pltf, Aplt, Petitioner,

V.

JOSEPH F. DEVEREUX, JR.,

Dfnt, Aple, Respondent.

JUSTICE STEVENS

APPLICATION FOR EXTENSION OF TIME TO FILE PETITION FOR WRIT OF CERTIORARI

COMES NOW Petitioner William H. Viehweg and as per SCR 13.6 timely files his application for extension of time to file his petition for writ of certiorari more than ten (10) days before said petition's current due date, and in support thereof, states:

1. This Court has jurisdiction as Viehweg seeks a review of a judgment and opinion (September 24, 1991) of the United States Court of Appeals, Eight Circuit, concerning a judgment issued in an original civil action in the United States District Court, Eastern District of Missouri, Eastern Division, with no request for rehearing made.

2. The trial court dismissed Viehweg's complaint at the pleading stage and the appellate court upheld.

Appendix A

3. Viehweg, a non-attorney, has been pro se throughout this action solely because of his inability to obtain legal counsel.

4. As a pro se, Viehweg misunderstood the ninety (90) days filing as merely a notice of appeal, not necessitating a complete petition upon which the immediate fate of Viehweg's action will be determined.

5. As such, Viehweg spent most of his allotted time soul searching and issue challenging and only recently did "decide" to appeal and now finds himself faced with the difficult task of writing a petition that not only conforms with the on-first-sight complicated rules of procedure, but also is able to hopefully persuade this august court to take my issues serious — whether or not it ultimately decides to grant my writ.

6. The subject matter involved in this action is fraud by an attorney upon his client, and as such is, besides being delicate, difficult and serious.

7. As the original action was dismissed at the pleading stage, with no injunction or stay issued, no party will be prejudiced in anyway should this court grant this application.

Therefore, petitioner Viehweg prays that this Court grant him sixty (60) days, to and including Friday, February 21, 1992, in which to file his petition for a writ of certiorari.

s/ William H. Viehweg
WILLIAM H. VIEHWEG
PETITIONER, Pro Se
114 W. 2nd South
Mt. Olive, Illinois 62069
1-217-999-5061

Appendix A

AFFIDAVIT OF SERVICE

I, William H. Viehweg, the undersigned, do under oath, say that a copy of petitioner's application for extension of time to file petition for writ of certiorari was mailed first class, prepaid, via the U.S. mails, by myself, on December 7, 1991, to Ronald C. Willenbrock, attorney for Respondent Devereux, of the law office of Amelung, Wulff & Willenbrock, at 515 Olive Street, Suite 1700, St. Louis, Mo. 63101.

s/ William H. Viehweg
WILLIAM H. VIEHWEG,
Petitioner
114 W. 2nd South
Mt. Olive, Ill 62069
1-217-999-5061

Subscribed to and sworn to before me Sharon Ruemmler on this 7th day of December, 1991, Notary Public

s/ Sharon Ruemmler
Signature

OFFICIAL SEAL
Sharon L. Ruemmler
Notary Public, State of Illinois
My Commission Expires 2-10-94

APPENDIX B — MOTION IN OPPOSITION TO APPLICATION FOR EXTENSION OF TIME

THE SUPREME COURT OF THE UNITED STATES

WILLIAM H. VIEHWEG,

Pltf, Aplt, Petitioner,

vs.

JOSEPH F. DEVEREUX, JR.,

Dfnt, Aple, Respondent.

JUSTICE J. STEVENS

MOTION IN OPPOSITION TO PETITIONER'S "APPLICATION FOR EXTENSION OF TIME TO FILE PETITION FOR WRIT OF CERTIORARI

COMES NOW respondent, Joseph F. Devereux, Jr., by and through his attorney, Ronald C. Willenbrock, and pursuant to SCR Part V — Motions and Applications, Rule 21.4 files his Motion in Opposition to Petitioner's "Application for Extension of Time to File Petition for Writ of Certiorari".

For grounds of said Motion in Opposition, respondent states:

1. SCR 13.6 provides "an application to extend the time to file a Petition for Writ of Certiorari must set out the grounds . . ., and must set forth with specificity the reason why the granting of an extension of time thought justified. . . . an application to extend the time to file a Petition for a Writ of Certiorari is not favored."

Appendix B

The grounds petitioner sets forth for his seeking an application for extension of time consists of:

> a) "The Trial Court dismissed Viehweg's Complaint in the pleading stage and the Appellate Court upheld."
>
> b) "Viehweg, a non-attorney, has been pro se throughout this action solely because of his inability to obtain legal counsel."
>
> c) "As a pro se, Viehweg misunderstood the ninety (90) day filing as merely a Notice of Appeal, not necessitating a complete Petition upon which the immediate fate of Viehweg's action will be determined."
>
> d) "As such, Viehweg spent most of his allotted time sole searching and issue challenging and only recently did 'decide' to appeal and now finds himself faced with the difficult task of writing a Petition that not only conforms with the on-first-cite complicated Rules of Civil Procedure, but also is able to hopefully persuade this august court to take my issues seriously — whether or not it ultimately decides to grant my Writ."
>
> e) "The subject matter involved in this action is fraud by an attorney upon his client, and as such is, besides being delicate, difficult and serious."

The items referred to the above as set forth by petitioner does not meet the standard of "good cause shown" for granting

of extension. *Kleem v. Immigration and Naturalization Service,* 107 S.Ct. 484, 479 U.S. 1308, 93 L.Ed.2d 566; *Mississippi v. Turner,* 111 S.Ct. 1032, 112 L.Ed.2d 1172.

THEREFORE, respondent, pursuant to Part V — Motions and Applications — SCR 21.4, files this Response in Opposition to Petitioner's Application for Extension of Time to File Petition of Writ of Certiorari, and respectfully requests that Petitioner's Application Be Denied.

s/ Ronald C. Willenbrock
RONALD C. WILLENBROCK
#18938
AMELUNG, WULFF &
WILLENBROCK
Attorney for Defendant-Appellee-
Respondent
Joseph F. Devereux, Jr.
515 Olive Street, Suite 1700
St. Louis, Missouri 63101
436-6757

Appendix B

CERTIFICATE OF SERVICE

I, Ronald C. Willenbrock, the undersigned, do under oath, say that a copy of Respondent's Motion in Opposition to Petitioner's Application for Extension of Time to File Petition for Writ of Certiorari was mailed first class, prepaid, via the U.S. Mail, by myself, December 12, 1991 to: William H. Viehweg, pro se petitioner, 114 West Second Street, Mount Olive, Illinois 60269.

s/ Ronald C. Willenbrock
RONALD C. WILLENBROCK
#18938

Subscribed to and sworn before me, a notary public, this 12th day of December, 1991.

_____
NOTARY PUBLIC

My Commission Expires:

_____

12-12.42-454/RCW/bmh

APPENDIX C — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHT CIRCUIT DATED SEPTEMBER 24, 1991

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 91-1798EMSL

William H. Viehweg,

Appellant,

vs.

Joseph F. Devereux, Jr.,

Appellee.

Appeal from the United States District Court for the Eastern District of Missouri

JUDGMENT

This appeal from the United States District Court was submitted on the record of the district court and briefs of the parties.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

September 24, 1991

Appendix C

A true copy.

Attest: s/ Illegible

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT

MANDATE ISSUED 10/17/91

Filed: 10/21/91

U.S. DISTRICT COURT
E. DISTRICT OF MO.

APPENDIX D — OPINION OF THE UNITED STATES DISTRICT COURT OF APPEALS FOR THE EIGHTH CIRCUIT DATED SEPTEMBER 11, 1991

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 91-1798

Appeal from the United States District Court for the Eastern District of Missouri

[UNPUBLISHED]

William H. Viehweg,

Appellant,

vs.

Joseph F. Devereux, Jr.,

Appellee.

Submitted: September 11, 1991

Filed: September 24, 1991

Before JOHN R. GIBSON, WOLLMAN, and MAGILL, Circuit Judges

PER CURIAM.

Appendix D

William H. Viehweg appeals from the district court's[1] order dismissing under Federal Rule of Civil Procedure 12(b)(6) his complaint claiming breach of fiduciary duty and fraud against his former attorney, Joseph F. Devereux, Jr. We affirm.

Whether a complaint states a cause of action is a question of law which this court reviews de novo. *Hilton v. Pine Bluff Public Schools,* 796 F.2d 230, 231 (8th Cir. 1986). This court also reviews de novo a district court's interpretation of state law. *Salve Regina College v. Russell,* 111 S. Ct. 1217, 1221 (1991). The district court correctly determined that Viehweg's action was required to be brought within five years under Mo. Rev. Stat. §§ 516.120(4) and (5) (1986). *See Vogel v. A.G. Edwards & Sons, Inc.,* 801 S.W.2d 746, 752 (Mo. Ct. App. 1990); *Carr v. Anding,* 793 S.W.2d 148, 149-50 (Mo. Ct. App. 1990). The court also correctly determined that the cause of action accrued at the latest on September 11, 1985. *See* Mo. Rev. Stat. §§ 516.100 and 516.120(5); *Zero Mfg. Co. v. Husch,* 743 S.W.2d 439, 441 (Mo. Ct. App. 1987); *Kueneke v. Jeggle,* 658 S.W.2d 516, 518 (Mo. Ct. App. 1983). We find meritless Viehweg's argument that he pleaded facts showing his action was not time-barred.

Devereux properly raised the statute of limitations defense. *See Southwestern Bell Tel. Co. v. Buie,* 758 S.W.2d 157, 161 (Mo. Ct. App. 1988). In any event, Viehweg's complaint reveals a time bar on its face. *Schnabel v. Taft Broadcasting Co.,* 525 S.W.2d 819, 821 (Mo. Ct. App. 1975) (if time bar clearly appears from face of pleading motion to dismiss even without specification of grounds properly sustained); *see also Zero Mfg. Co.,* 743 S.W.2d at 441.

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1. The Honorable Jean C. Hamilton, United States District Judge for the Eastern District of Missouri.

Appendix D

We also conclude that the court properly denied Viehweg leave to file a second amended complaint and to join an additional defendant, and that the court properly denied his requests for sanctions as moot.

Accordingly, the judgment is affirmed.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT